No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF NATIONAL CABLE TELEVISION ASSOCIATION, INC., OKLAHOMA CABLE TELEVISION ASSOCIATION, AMERICAN TELEVISION AND COMMUNICATIONS CORP., VIACOM INTERNATIONAL, INC., AND ENTERTAINMENT AND SPORTS PROGRAMMING NETWORK, INC. IN SUPPORT OF PETITIONERS

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The National Cable Television Association, Inc. ("NCTA"), the Oklahoma Cable Television Association ("OCTA"), American Television and Communications Corp. ("ATC"), Viacom International, Inc. ("Viacom"), and Entertainment and Sports Programming Network, Inc. ("ESPN") respectfully submit this brief *amicus curiae* in support of Petitioners.

INTEREST OF AMICI CURIAE

NCTA is the principal trade association representing cable television operators in the United States. NCTA's members operate more than 2,000 cable systems nationwide. OCTA is an association of cable operators in Oklahoma representing more than 140 systems with over 400,000 subscribers. ATC, a wholly-owned subsidiary of Time, Inc., owns and operates 124 cable television systems in 33 states. Viacom is a diversified communications and entertainment company. Among other activities, Viacom owns 42 cable television systems in the United States and operates an advertiser-supported satellite cable network. ESPN is an advertiser-supported program service that provides sports programming and a daily business news program by satellite to over 28 million subscribers throughout the United States. ESPN serves 194 cable systems and other affiliates in Oklahoma. It regularly carries wine commercials.

Cable operators and advertiser-supported program services have a direct and substantial interest in this case. The court below has held that Oklahoma may prohibit cable operators from transmitting commercials for alcoholic beverages (including wine) on any of its channels. The result of such a prohibition is to limit drastically the sources of news and entertainment programming available to Oklahoma cable operators for retransmission to subscribers on their multichannel cable systems.

Microwave and satellite technology now makes it possible for cable systems to offer their subscribers not only improved reception of local over-the-air broadcast signals, but also distant, out-of-state broadcast signals and national cable networks. Many of these program sources contain advertising, including wine commercials. Because it is practically impossible for a cable operator to delete specific commercials from the numerous program services carried by his system (and because deletion of commercials from distant broadcast signals would be unlawful and result in copyright liability), the effect of the Okla-

homa statute is to prevent Oklahoma cable systems from transmitting any distant broadcast signals and cable networks that may include wine commercials.

The law thus severely restricts the cable operator's discretion in selecting programming and prevents subscribers from receiving any of the wide range of advertiser-supported program services that emanate from outside Oklahoma and would otherwise be available. The impact on advertiser-supported cable services is also severe. In seeking to survive in competition with national broadcast networks and other programming sources, these cable services generally depend upon a national audience of the largest possible size. If a state can effectively prevent a cable program service from reaching its residents, the result is not only to deny the service to cable operators and subscribers within that state but also to threaten the viability of the service nationwide.

For these reasons, NCTA, OCTA, ATC, Viacom, and ESPN submit this brief *amicus curiae* and urge the Court to reverse the decision of the court of appeals.

SUMMARY OF ARGUMENT

This case raises the question whether a state may prohibit cable television systems from carrying truthful advertisements for alcoholic beverages that may lawfully be sold in the state. The court of appeals characterized the case as one involving a restraint on "commercial speech" and held that, under the standards set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the restraint was permissible.

This Court has repeatedly held, however, that the First Amendment does not permit a state to attempt to suppress consumption of a product by completely prohibiting the lawful advertising of that product. The court of appeals ignored those holdings in applying the *Central Hudson* standards, even though those standards were intended to

summarize and synthesize—and not to overrule—this Court's decisions regarding commercial speech. The mere fact that the products at issue are alcoholic beverages does not justify a prohibition on the truthful advertising of such products. The Twenty-first Amendment empowers states to ban the sale of alcoholic beverages if they desire to suppress consumption of such beverages. It does not, however, authorize states to suppress the flow of information about lawful alcoholic beverages in order to promote an asserted interest in discouraging consumption. This Court's decision in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), does not, as the court of appeals held, mandate a contrary conclusion. That case simply reaffirmed the right of states to impose restrictions on *licensed sellers* of alcoholic beverages; it did not uphold a complete prohibition on all advertising of such beverages.

In any event, the court of appeals, by focusing on commercial speech, completely ignored the most serious First Amendment restraints imposed by the Oklahoma statute. When applied to cable systems, the statute suppresses much more than mere commercial speech. It is practically impossible and, in some cases, unlawful for cable operators to delete commercials from the broadcast and nonbroadcast program services that they carry on their systems. Therefore, the only way to comply with the Oklahoma statute is to stop carrying any of the multitude of distant broadcast signals and advertiser-supported satellite cable services that may contain wine commercials. Thus, the statute severely restricts the selection of news and entertainment services available to cable systems and to their subscribers and effectively blocks national and out-of-state advertiser-supported program services that choose to carry wine commercials from reaching Oklahoma residents. Wholly apart from the standards that may apply to the suppression of commercial speech, no regulatory interest permits a state to impose such a restraint on noncommercial ideas and information.

Finally, the Oklahoma statute is inconsistent with and preempted by federal law. In general, the Federal Communications Commission has clearly sought to occupy the area of signal carriage regulation to the exclusion of state and local governments, and has adopted a policy of encouraging unrestricted carriage of distant broadcast signals and nonbroadcast satellite services by cable systems. A state law that effectively prevents or prohibits cable systems from carrying particular broadcast or nonbroadcast signals is therefore preempted. Moreover, FCC rules require cable operators to carry local and nearby broadcast signals, some of which may originate from neighboring states. The FCC prohibits deletions of commercials from these signals, but the Oklahoma statute prohibits the carriage of wine commercials. To the extent that compliance with the Oklahoma statute would violate these FCC rules, the Supremacy Clause effectively nullifies the state law.

ARGUMENT

Introduction

On one level—the level on which the court of appeals analyzed it—this case raises the straightforward question of the extent to which a state may prohibit the truthful advertising of alcoholic beverages where the sale of such beverages is wholly lawful. Although this Court for many years adhered to the view that "commercial speech" was not generally entitled to First Amendment protection, the Court has in recent years completely rejected this position. Consistently, the Court has held that the First Amendment does not permit states to bar the truthful advertising of a lawful product. The decision of the court below upholding Oklahoma's prohibition on the advertising of wine and liquor is flatly inconsistent with these holdings.

The impact of the Oklahoma statute[1] on protected speech, however, became even more severe when, in May

[1] Oklahoma Alcoholic Beverage Control Act, 37 Okla. St. Ann. sec. 516 (1982). *See also* Okla. Const. art. 27, sec. 5.

1980, the state's Attorney General reversed past policy and ruled that the statute prohibits cable systems in Oklahoma from carrying advertisements for alcoholic beverages on any of the signals that they transmit to their subscribers. As so interpreted, the statute inhibits more than the dissemination of information and advertising regarding alcoholic beverages. Its effect is now to prevent Oklahoma cable operators from retransmitting—and Oklahoma residents from receiving—any out-of-state broadcast signals and national, satellite-delivered program services that may happen to carry advertisements for alcoholic beverages.

The signals transmitted by cable systems to their subscribers are generally obtained from several sources. One source is local and nearby broadcast signals, which are received over-the-air, using a tall master antenna. In its earliest days, cable television's principal function was to provide clear reception of nearby signals in rural areas where over-the-air reception was poor. Microwave relay systems subsequently made possible the retransmission of broadcast signals from more distant locations.

With the advent of satellite technology, cable operators can now also choose from among a large number of broadcast and nonbroadcast program services that are transmitted specifically for cable systems by satellite. The FCC has noted that "[a]s a result of satellite technology, cable systems and their subscribers have access to an extremely rich and divergent mix of program and information services."[2] From among all these available

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[2] *Amendment of Part 76, Subpart G of the Commission's Rules and Regulations Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems* (MM Docket No. 83-331), Notice of Proposed Rulemaking, FCC 83-130, ¶ 25 (May 25, 1983).

For example, there are already 24-hour news services, ethnic, youth and adult-oriented program channels. There are in operation or under development, religious program channels,

broadcast and nonbroadcast program sources and his own locally produced programming, the cable operator fills his channels with the programming that in his judgment will best meet the needs and demands of his community.

Most television broadcast stations are advertiser-supported. In addition, while some cable services, such as premium movie channels, are supported completely by fees charged to the cable system and its subscribers, many satellite-delivered cable services contain commercial advertising.[3] These broadcast and satellite-delivered nonbroadcast sources may and often do contain wine advertisements. Oklahoma's statute, as upheld by the court of appeals, prohibits cable operators in the state from carrying any of these program sources on their systems unless they delete all such advertisements.

But deletion of particular advertisements from various program services is, in most circumstances, impossible and, in the case of commercials carried by broadcast stations, is unlawful. As the evidence in this case indicated, cable systems are not designed to enable the monitoring and deletion of commercials. In part, this is because cable operators have no way of knowing when the numerous advertiser-supported program services that they retransmit will carry a wine commercial. Thus, cable operators would have to monitor all channels simultaneously on a 24-hour-a-day basis and, upon identifying a wine commercial, try instantaneously to delete it. The

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> political affairs channel, all weather, all sports, health channels, channels of foreign language programming, of cultural programming, women's programming, and regionally oriented satellite networks. In addition, many new program or information services are in the developmental stage and will be added to the existing list of cable satellite networks that now provide diversified information and programming to the public.

Id.

[3] Currently, there are 41 operating satellite-delivered services, of which 19 are advertiser-supported. NCTA Satellite Services List (Nov. 1983).

receipt and retransmission of cable services is generally automated and does not require constant monitoring. Even if it were possible to recognize and instantly delete each wine commercial, the cost of hiring personnel to perform this function would be prohibitive.[4] Thus, as the district court found, "[t]here exists no feasible way for [cable systems] to block out the advertisements."[5]

With respect to the deletion of wine advertisements from out-of-state broadcast signals, the problem is not merely one of infeasibility. The FCC flatly prohibits cable operators from deleting advertisements from the broadcast signals that they carry. *See* 47 C.F.R. § 76.55(b) (1982). In addition, under the Copyright Act of 1976, a cable operator who deletes commercials from broadcast signals forfeits his statutory license to carry those signals and is liable for copyright infringement. *See* 17 U.S.C. § 111(c)(3) (Supp. V 1981).

Therefore, the effects of Oklahoma's prohibition on the retransmission of wine commercials is to prohibit cable systems from carrying any of the multitude of available advertiser-supported program services that may carry wine commercials. The law ensures that Oklahoma cable

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[4] *See, e.g.*, II R. 36-41, 45-46, 54-57. Moreover, even if program services gave cable operators advance notice of when wine commercials would appear, it would still be necessary to effect deletions manually. While currently available automated equipment is capable of deleting entire programs on a particular channel, this equipment cannot be timed so precisely as to enable deletion of 10-, 30- or 60-second spot commercials. In any event, while nonbroadcast satellite cable services could conceivably be persuaded to make available such information to cable affiliates, there is no way to find out when a distant broadcast signal will carry wine commercials. Cable systems have no relationship at all with broadcasters whose signals are received off-the-air for retransmission to cable subscribers.

[5] Appendix to Petition for Certiorari ("Pet. App.") at 41a. The court of appeals did not dispute this finding and specifically recognized that, because of the statute, "cable operators especially are placed in a difficult position." Pet. App. at 23a.

subscribers will not see liquor and wine commercials; it also ensures that they will not see any of the news, sports and entertainment programming carried by out-of-state broadcast stations (including the satellite-delivered "superstations"), by ESPN, by the Cable News Network, or by any of the other advertiser-supported program services that may occasionally carry such commercials.

Furthermore, by restricting a cable operator's ability to provide what he perceives to be the most desirable program services, the statute could undermine the viability of cable service altogether in some Oklahoma communities. Cable television is a highly capital-intensive business. A cable operator's decision to wire an entire community and equip his facilities is premised on his ability to provide a multi-channel package of program services that best meets the demands of his community. If a state makes it impossible to include distant broadcast signals or advertiser-supported satellite services in that package, the value of his service to subscribers will be diminished, "probably caus[ing] a large but inherently immeasurable reduction in . . . subscriber revenue." [6] Remaining revenues may be insufficient to cover the costs of operating the system.

The Oklahoma prohibition is injurious to the suppliers of advertiser-supported cable services as well. In order to compete with the national television broadcast networks for the advertising revenues that support their services, ESPN and other cable programmers require a national audience of the largest possible size. Since the effect of Oklahoma's prohibition will be to shut out advertiser-supported program services from the state, the prohibition will undermine the services' efforts to build a national audience and their ability to compete.

The court of appeals analyzed the Oklahoma advertising prohibition as if it affected only "commercial speech,"

[6] Pet. App. at 42a.

and held that, under this Court's decisions, a ban on the advertising of alcoholic beverages was permissible. As shown below, this holding was based on an erroneous application of those decisions. As applied to cable operators, however, the Oklahoma statute not only infringes commercial speech but also suppresses the distribution of all the programming that appears on the same service as the prohibited commercial speech—an even more serious First Amendment restraint. Moreover, the statute, by effectively prohibiting the carriage of certain broadcast and nonbroadcast signals, is inconsistent with and preempted by federal law. In general, as discussed below, the FCC has preempted all regulation of signal carriage by cable operators. Additionally, the statute in some instances prevents cable operators from carrying signals that the FCC's rules require them to carry—an inconsistency that the Supremacy Clause resolves by invalidating the state's requirement.

I. The Oklahoma Liquor Advertising Prohibition Is an Impermissible Restraint on Commercial Speech.

Viewed simply as a restraint on commercial speech, Oklahoma's prohibition on the advertising of alcoholic beverages is impermissible under the First Amendment. As this Court has repeatedly made clear during the last decade, even speech that does no more than "simply propose a commercial transaction" is entitled to First Amendment protection.[7] Although "[s]ome forms of commercial speech regulation—such as regulation of false

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[7] *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). *See also Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983); *In re R.M.J.*, 102 S. Ct. 929 (1982); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

or misleading speech—'are surely permissible,' "[8] Oklahoma's prohibition is outside the limits of permissible regulation.

The sale of alcoholic beverages is not unlawful in Oklahoma. However, the state seeks, by prohibiting liquor advertising, "to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse."[9] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976), this Court squarely addressed the question "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its dissemination and its recipients" and decided that the "answer . . . is in the negative." As the Court found,

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770. A year later, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court, relying on *Virginia State Board of Pharmacy, supra*, held that a state could not prohibit truthful advertising of legally available contraceptives in order to discourage their use and discourage illicit sexual activity.[10]

The court of appeals held, however, that Oklahoma's total ban on liquor advertising was permissible. Ignoring the unambiguous holdings of this Court that a state may not completely prohibit truthful advertising of a lawful product, the court of appeals reached its decision by mis-

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[8] *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. at 91-92 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 770).

[9] Pet. App. at 20a.

[10] *See also Metromedia, Inc. v. City of San Diego, supra*, 453 U.S. at 505 (1981).

applying the standards for reviewing restraints on commercial speech that this Court enunicated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under the "four-part" analysis described in that decision, the Court must

> determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Applying that test, the court of appeals held that, since the prohibited advertising concerned lawful activity and was not misleading, it was protected by the First Amendment. However, the court held that Oklahoma's interest in reducing alcohol consumption was substantial and that prohibiting advertisements for alcoholic beverages was permissible insofar as it directly advanced and was not more extensive than necessary to serve that interest. Under the court of appeals' approach, the *Central Hudson* test apparently supersedes this Court's earlier holdings that it is never permissible for a state to seek to suppress consumption of a lawful product by prohibiting the truthful advertising of that product. If a state could impose such a prohibition whenever it had a "substantial interest" in discouraging the product's use, the First Amendment protections afforded to commercial speech by those precedents would be vitiated.

This Court gave no indication of any intent, in *Central Hudson*, to overrule its precedents. To the contrary, its four-part test was designed to provide a comprehensive

synthesis of all the Court's holdings in the area of commercial speech. Thus, as the Court subsequently stated with respect to the *Central Hudson* standards,

> We recognize, of course, that the generalizations summarized above do not afford precise guidance to the Bar and the courts. *They do represent the general principles that may be distilled from our decisions in this developing area of the law.* As they are applied on a case by case basis . . . more specific guidance will be available.

In re R.M.J., 102 S. Ct. 929, 938 n.16 (1982) (emphasis added).

Indeed, in *Central Hudson* itself, the Court reaffirmed that it "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n.9. A year later, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), the Court made clear that nothing in *Central Hudson* had altered the fundamental holding that "[a] State may not completely suppress the dissemination of truthful activity merely because it is fearful of that information's effect upon its disseminators and recipients."

The court of appeals' "workmanlike" [11] application of the *Central Hudson* standards simply ignores the precedents of this Court on which those standards are based. Those precedents make clear that, if the state has a legitimate interest in discouraging use of a product, it may ban the product itself or it may publicize the product's defects and attempt to persuade the public not to buy it. Or it may, in some circumstances, regulate the "time, place and manner" in which the product

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[11] *See Dunagin v. City of Oxford, Miss.*, Nos. 80-3762, 82-4076, slip op. at 489 (5th Cir. Oct. 31, 1983) (Gee, J., dissenting).

is advertised.[12] But it may not shut off the flow of information about the product in the hope that, as a result, consumption will decline. *Central Hudson* provides that a regulation of commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . [or] if the governmental interest could be served as well by a more limited restriction on commercial speech." 447 U.S. at 564. Under the *Central Hudson* test, a flat prohibition on advertising is simply too indirect a method to advance the state's public policy goals [13] and is too broad a restraint on speech.[14]

This outcome is unaffected by the fact that, in the present case, the advertising at issue concerns alcoholic beverages. The Twenty-first Amendment gives states the unusual power to ban the importation of alcoholic beverages into the state—a power that would otherwise be forbidden by the Commerce Clause of the Constitution.

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[12] *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 771; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93; *Carey v. Population Services Int'l, supra,* 431 U.S. at 700.

[13] *See Central Hudson, supra,* 447 U.S. at 566 n.9: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy." *See also id.* at 579 (Blackmun, J., concurring): "If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels."

[14] Because cable operators in Oklahoma cannot delete wine advertisements carried on a program service, the Oklahoma ban effectively requires that the service either not carry such advertisements or forfeit its right to appear in Oklahoma. If, in order to ensure carriage by Oklahoma cable systems, the program service chooses the former, the restraint on commercial speech would be particularly overbroad. The effect in that case would be to suppress commercial speech even in states that do not share Oklahoma's interest in silencing speech proposing the sale of wine.

But the Twenty-first Amendment does not supersede the First Amendment or other Constitutional protections of individual rights,[15] and does not give states the power to ban truthful advertising of a lawful product. In holding to the contrary, the court of appeals erroneously relied on this Court's dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), "for want of a substantial federal question."

As the court of appeals stated, the regulations upheld in that case "prohibited off-premises price advertising by *holders of liquor certain liquor permits*." Pet. App. at 7a (emphasis added). This Court has held that the Twenty-first Amendment empowers states to prohibit the sale of alcoholic beverages and, in some cases, to limit the time, place and manner in which such beverages are sold by imposing restrictions on licensed liquor establishments. Thus, in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 (1981) (*per curiam*), the Court held that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." Similarly, in *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld a prohibition on acts of "gross sexuality" in establishments where liquor is served. In both cases, as in *Queensgate, supra*, the statute's prohibition "applie[d] only to establishments which [were] licensed by the State to serve liquor." *Bellanca, supra*, 452 U.S. at 716.

What is at issue in the present case, however, is not the extent to which states may regulate the activities or speech of licensed sellers of alcoholic beverages but the extent to which all advertising of the product itself may be prohibited, even where the advertiser is not a

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[15] *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-10 (1980); *Craig v. Boren*, 429 U.S. 190, 209 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

state licensee. The regulations upheld by this Court in *Queensgate* did not completely prohibit all advertising of alcoholic beverages in order to suppress their sale and consumption, and they applied only to price advertising by licensed retailers and not to advertising by producers of alcoholic beverages. Nevertheless, the court of appeals was inexplicably "confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same," Pet. App. at 14a, and concluded that

> [w]hen the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result.

Id. at 24a.

The Twenty-first Amendment is relevant to this case, if at all, only to the extent that it arguably confirms that Oklahoma may have a legitimate and "substantial" interest in regulating the sale and consumption of alcoholic beverages.[16] But, as shown above, Oklahoma's advertising prohibition fails the *Central Hudson* test not because there is no substantial state interest but because, as this Court has consistently held, a total advertising

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[16] The manner in which Oklahoma has implemented its ban raises questions as to how substantial its interest in suppressing liquor advertising really is. Oklahoma permits such advertising to appear in newspapers and magazines that circulate within but are published outside the State. There is no meaningful basis for distinguishing between the circulation of out-of-state publications and the carriage by cable systems of out-of-state and national program services. Oklahoma's disparate treatment of different media for the dissemination of wine advertisements presents serious constitutional problems, and also suggests that Oklahoma's interest in banning wine advertisements that appear on cable systems is less substantial than the Court of Appeals assumed.

prohibition is an overbroad, indirect, and impermissible means of furthering that interest, even if it is substantial.

Both the court below and the United States Court of Appeals for the Fifth Circuit, in a recent decision upholding a liquor advertising prohibition,[17] have erroneously suggested that, since states are empowered by the Twenty-first Amendment to ban the sale of alcoholic beverages, they may take the "less restrictive" step of permitting the sale but prohibiting the advertising of such beverages. The Fifth Circuit has gone so far as to suggest, for example, that "there may be no First Amendment protection of purely commercial advertising of those products which the state *could* entirely proscribe." [18] But, as the decisions of this Court have made clear, the First Amendment requires a different conclusion as to which step is more restrictive. Banning the dissemination of truthful information regarding a lawful product is more intrusive on freedom of speech and the flow of ideas, and thus less permissible, than is banning the product itself.

II. The Advertising Prohibition Infringes Noncommercial Speech By Preventing Cable Operators From Carrying National and Out-of-State Program Services.

Focusing exclusively on the "commercial speech" aspects of this case, the court of appeals ignored the even more significant restraints on noncommercial speech that result from application of Oklahoma's liquor advertising prohibition to cable television's retransmission of distant broadcast signals and satellite-delivered nonbroadcast program services. By effectively preventing cable operators from carrying any such signals and services that may contain wine commercials, the statute unlawfully intrudes on the discretion of cable operators in selecting programming and of cable programmers in producing programming. It also

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[17] *Dunagin v. City of Oxford, Miss., supra.*

[18] *Id.*, slip op. at 474 (emphasis added).

drastically limits the viewing options and the flow of information available to Oklahoma residents. Such restraints on noncommercial speech go directly to the heart of the First Amendment.

Any governmental action that restricts available program sources and limits a media operator's editorial discretion in compiling and distributing a package of information to the public infringes basic First Amendment interests. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The Oklahoma statute, even if intended only to suppress liquor advertising,[19] prevents cable operators from selecting and Oklahoma viewers from receiving out-of-state broadcast signals and national news, sports, information and entertainment services merely because those services may occasionally include wine commercials. Even if the commercials themselves were entitled to no First Amendment protection, this broad restraint on the national "free trade in ideas"[20] would be constitutionally impermissible. Short of a national emergency or a clear and present danger, no regulatory interest permits a state to surround itself with an "iron curtain" that prevents out-of-state information and communications from reaching its citizens.

It was just this sort of restraint on national and interstate communications media that worried this Court when it struck down Virginia's ban on abortion advertisements in *Bigelow v. Virginia, supra*, 421 U.S. at 828-29 (1975):

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[19] "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365 (1983).

[20] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

Although Virginia's prohibition was never applied to national or interstate newspapers or publications distributed in the state, the Court left little doubt that any such application—which could effectively preclude distribution of these newspapers and publications in Virginia—would run afoul of the First Amendment because

> [t]he policy of the First Amendment favors dissemination of information and opinion and "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 Cooley, Constitutional Limitations 886 (8th ed.)."

421 U.S. at 829, quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.).[21]

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[21] In *Dunagin v. City of Oxford, Miss., supra*, the United States Court of Appeals for the Fifth Circuit upheld, as a lawful restraint on commercial speech, a statute that "bann[ed] intrastate liquor advertising while allowing advertising to enter Mississippi from out-of-state media." Slip op. at 486. However, the court thought it "exceedingly unlikely that the state could block, jam, or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical matter, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment." *Id.* at 487.

Oklahoma has similarly refrained from applying its prohibition on liquor advertising to newspapers and other publications printed outside the state. But by applying the law to commercials carried by the national or out-of-state program services that Oklahoma cable systems retransmit, the state restrains the flow of information just as surely as if it were to forbid distribution of The New York Times, The Wall Street Journal, Time and the New Yorker because they contained liquor advertisements.

Moreover, the statute severely restricts the ability of each Oklahoma cable operator to assemble that package of services that, in his judgment, best meets the needs and demands of his subscribers. Like newspapers, cable operators offer their subscribers a package of diverse entertainment and information, some of which they originate and some of which they obtain from other sources. No longer do cable systems merely retransmit local broadcast signals; like a newspaper, a cable system is "more than a passive receptacle or conduit for news, comment, and advertising." *Miami Herald Publishing Co. v. Tornillo*, *supra*, 418 U.S. at 258. As this Court found in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), cable operators now exercise "a significant amount of editorial discretion regarding what their programming will include." [22]

While the Court has not had occasion to address specifically the First Amendment status of cable television, there can be no doubt that cable operators' editorial discretion in selecting programming is protected from gov-

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[22] *See also Community Cable TV, Inc.*, CSR-2269, FCC 83-525, ¶ 20 (Nov. 15, 1983):

> [V]igorous and growing competitors in the video services market pose a new challenge to nonbroadcast programming entrepreneurs and cable system operators . . . . The current situation requires that system operators and nonbroadcast programming entrepreneurs retain maximum flexibility in the marketplace to experiment with types of program offerings and methods to pay for such programs, *i.e.*, advertisers, subscriber fees, network compensation, or a combination.

ernmental intrusion. Lower courts that have considered the issue have generally confirmed that cable systems are media of expression whose programming and editorial discretion are protected by the First Amendment.[23] The Oklahoma statute effectively strips cable operators of this discretion and, with respect to advertiser-supported programming, makes cable little more than a retransmitter of local broadcast stations.

Any restraint on truthful advertising of a lawful product creates First Amendment problems. However, a law that prevents cable operators from offering, and state residents from receiving national program services and out-of-state broadcast signals goes far beyond the mere regulation of commercial speech. The state's interest in discouraging consumption of alcoholic beverages does not even justify the suppression of liquor and wine commercials. It cannot conceivably provide a legitimate basis for the suppression of the news, sports, information and entertainment programming that appears on the advertiser-supported services with those commercials.

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[23] *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 48-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cruz v. Ferre*, No. 83-330 (S.D. Fla. Aug. 2, 1983). *But see Berkshire Cablevision of Rhode Island, Inc. v. Burke*, C.A. No. 82-0537P (D.R.I. Sept. 15, 1983).

Some courts have questioned the extent to which the First Amendment protects cable operators from regulations that do not directly affect program content and editorial discretion. *See, e.g., Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder, supra*, 660 F.2d at 1377-79. However, no such questions apply where, as here, content control is at issue.

III. The Oklahoma Statute, As Applied to Cable Operators, Is Preempted by Federal Law.

As shown in Parts I and II, *supra*, any restrictions on the advertisements and on the noncommercial programming that cable operators may carry on their systems raise serious First Amendment problems—problems that can be triggered by federal restrictions as well as by state and local laws. However, to the extent that regulation of cable systems is constitutionally permissible and to the extent necessary to accomplish its statutory mandate, the FCC is authorized to determine the regulatory framework under which cable must operate.[24] Oklahoma's prohibition on the carriage of advertising of alcoholic beverages—and the effects of that prohibition—are inconsistent with the regulatory framework that the FCC has adopted. Where such inconsistency exists, the state law is preempted and invalidated by federal law.

This Court has developed a two-pronged test for determining when state laws are subject to federal preemption. First, a state statute is preempted where Congress has specifically "prohibited state regulation of the particular aspect of commerce involved," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), or has "sought to occupy the field to the exclusion of the States," *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Second,

> [e]ven when Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when

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[24] *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). *See also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

> state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, 103 S. Ct. 1713, 1722 (1983); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982).

Where Congress has delegated regulatory authority to an administrative agency, the agency has authority to preempt state and local laws: "Federal regulations have no less pre-emptive effect than federal statutes," and "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law. . . ." *Fidelity Federal Savings and Loan Association v. de la Cuesta, supra*, 102 S. Ct. at 3023.

Under both prongs of the test, Oklahoma's liquor advertising prohibition is preempted by federal law. First, and most importantly, the FCC has explicity sought to occupy exclusively the field of signal carriage regulation and to preempt state and local laws and regulations that require a cable operator to carry or not to carry particular signals. Second, it is physically impossible, in some circumstances, for Oklahoma cable operators to comply both with FCC rules requiring carriage of certain broadcast signals and prohibiting deletion of commercials from those signals and with the state's prohibition on the carriage of advertising for alcoholic beverages.

The FCC has stated unambiguously its intention to occupy exclusively the field of signal carriage regulation: "The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulations is unquestioned." *Clarification of the Cable Television Rules and Notices of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974).[25] The basis for preempting

[25] *See also Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional*

state and local regulation of the services provided by cable systems has been the FCC's view that cable is an integral part of the nationwide communications system that Congress has charged the FCC with nurturing:

> The implications of the development of cable must be viewed as one part, albeit an increasingly important part, of a much broader communications complex . . . . The communications provided by broadcasters, common carriers, specialized carriers such as multipoint distribution services, satellites, etc., and cable must all be viewed with the objective of achieving a unified whole, a structure that will indeed accomplish the goal set for us in the Communications Act of a ". . . rapid, efficient, nationwide and worldwide radio communications service." [26]

In order to achieve this regulatory goal, "external effects, such as added regulation or regulation inconsistent with that adopted pursuant to our overall communications objectives must be considered and dealt with." [27]

In the 1960's and 1970's, the FCC believed that its overall regulatory goals would be served by *restricting* the signals that cable systems could carry. In an unabashed effort to protect local broadcasting, the Commission required cable operators to carry all local broadcast signals and severely limited the number of distant signals that cable operators could import for their subscribers.[28] When the FCC's distant signal limitations were in effect, a state or local rule requiring cable systems to carry more

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Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television (Dkt. No. 20272), Report and Order, 54 F.C.C.2d 855, 863 (1975) ("The subject areas this agency has preempted include, of course, signal carriage . . . .").

[26] *Id.* at 865.

[27] *Id.*

[28] *See Malrite TV of New York v. FCC*, 652 F.2d 1140, 1144 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

than the permissible number of distant signals would clearly have been preempted.

In recent years, however, the FCC has reconsidered and substantially abandoned its view that the development of a nationwide communications service is somehow best fostered by restricting cable's ability to compete. Thus, in 1980, the FCC eliminated its restrictions on distant signal carriage, finding that

> the benefits to existing and potential cable households from permitting the carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services that presently is unavailable in their communities.[29]

The FCC explicity decided that limiting signal carriage was inconsistent with its comprehensive regulatory scheme for the national communications marketplace.[30] This Court has made clear that

> "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation.

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[29] *Cable Television Syndicated Program Exclusivity Rules* (Docket No. 20988), Report and Order, 79 F.C.C.2d 663, 746 (1980), *aff'd sub nom. Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

[30] The rules artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many communities. Thus we conclude confidently that elimination of the distant signal carriage and syndicated exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace of ideas.

Id. at 813-14 (1980).

Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)). Thus, the FCC's decision that limitations on signal carriage do not serve the public interest precludes state and local governments from imposing any such limitations.

The FCC's policy against limiting signal carriage preempts state restrictions not only on broadcast signal carriage but also on the carriage of nonbroadcast, satellite-delivered cable services. Thus, the FCC has "specifically declared that non-federal regulatory policies inconsistent with the federal objective of unregulated *availability* and pricing of *nonbroadcast* services were preempted." [31]

Although the purposes of the Oklahoma statute may simply be to prevent the dissemination of liquor advertising and to discourage liquor consumption, it is a law's effect and not its purpose that determines whether it is preempted. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). The effect of the statute is to prevent cable operators in the state from carrying out-of-state broadcast signals and satellite-delivered cable services that may include wine commercials, thus restricting the availability of program sources and the development of new cable services. Indeed, the FCC has specifically addressed Oklahoma's advertising prohibition and found it to be directly at odds with its regulatory objectives:

> State controls over advertising on cable channels distributed by space satellite may both undercut the

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[31] *Community Cable TV, Inc.*, CSR-2269, FCC 83-525, ¶ 13 (Nov. 15, 1983) (emphasis added). "Thus, the Commission has deliberately preempted state regulation of non-basic program offerings, both non-broadcast programs and broadcast programs delivered to distant markets by satellite." *Id.*, ¶ 17. The FCC's preemption of rate regulation for nonbroadcast programming was upheld by the United States Court of Appeals for the Second Circuit in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

economic base for such services and render their operation on an interstate basis a practical impossibility . . . . The types of regulation promulgated by the state of Oklahoma in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 450 (10th Cir. 1983), *petition for cert. filed sub nom. Capital Cities Cable, Inc. v. Crisp*, No. 82-1795, would thus undermine the goals of preemption articulated by the Commission in this and earlier cases.[32]

The statute, therefore, clearly "stands as an obstacle to the accomplishment and execution of the full purposes of" the Commission, and is preempted. *Hines v. Davidowitz*, *supra*, 312 U.S. 52, 67 (1941).

An additional basis for preemption is that, in some instances, it is impossible for cable operators to comply with both the Oklahoma statute and FCC rules. Although the FCC has eliminated its former restrictions on distant signal carriage, it still retains its rules requiring cable systems to carry local and nearby broadcast signals.[33] In many cases, Oklahoma cable operators located near the state's borders are required by these rules to carry out-of-state signals, most of which carry wine commercials.[34] FCC rules also prohibit cable operators from deleting com-

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[32] *Community Cable TV, Inc., supra*, ¶ 20 n. 26.

[33] *See* 47 C.F.R. §§ 76.57-76.61 (1982).

[34] For example, cable operators in southwestern Oklahoma are required to carry signals originating in Wichita Falls and Amarillo, Texas. Systems in southern and southwestern Oklahoma must retransmit signals from Texarkana, Arkansas; Shreveport, Louisiana; and Sherman, Texarkana and Denison, Texas. Eastern Oklahoma systems are required to carry signals from Fort Smith, Arkansas. Systems in northern and northeastern Oklahoma must carry signals from Joplin, Missouri, and Wichita and Pittsburg, Kansas. Without these "must carry" signals from out-of-state broadcasters, most border communities would, because of topographical and technological restraints, be deprived of major network telecasting.

mercials from the broadcast signals that they carry.[35] But if these cable operators carry the out-of-state "must carry" signals intact, then they will violate the Oklahoma statute each time a wine commercial appears. If, to comply with the Oklahoma statute, they refuse to carry these signals or delete all wine commercials, they violate FCC rules. The Supremacy Clause resolves such dilemmas by nullifying the state requirement insofar as it is inconsistent with federal law.

Thus, even if there were no affirmative intention on the part of the FCC to occupy the field of signal carriage regulation, the FCC's "must carry" rules and its rules prohibiting deletion of commercials would preempt the Oklahoma liquor advertising prohibition in those instances where they required carriage of such advertising. This partial preemption is, however, subsumed by the FCC's broader preemption of the entire field of signal carriage regulation—a preemption that, like the First Amendment, completely nullifies the statute's applicability to cable television's retransmission of out-of-state and national program services.

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[35] *See* 47 C.F.R. § 76.55(b) (1982). *See* also 17 U.S.C. § 111(c) (3) (Supp. V 1981).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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